Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

ITTELLA FOODS, INC.,
Petitioner,

vs.

ZURICH INSURANCE COMPANY and
NORTHERN INSURANCE CO. OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit violate the most basic tenets of judicial review, thereby undermining the very integrity of the judicial process, by summarily reversing a $12 million punitive damages award rendered by a unanimous jury and affirmed in the detailed written decision of a respected District Court judge, where:

A. The only facts about the case which the Ninth Circuit even mentioned were that "reasonable people could conclude that the insurance company was trying to chisel Ittella Foods...";

B. The Ninth Circuit never even mentioned the District Court's written findings, much less explained why they allegedly were clearly erroneous and should therefore not be accepted; and

C. The Ninth Circuit never explained how or why the conduct at issue allegedly did not satisfy California's punitive damages law?

PARTIES TO THE PROCEEDING

Petitioner is Ittella Foods, Inc., a California corporation whose stock was wholly owned by members of the Galletti family. Subsequent to the trial, the corporation was sold, but the family retained rights to the proceeds of the litigation.

Respondents are Zurich Insurance Company and Northern Insurance Company of New York ("Northern"). Northern is a wholly-owned subsidiary of Maryland Casualty Company, a Maryland corporation. Maryland Casualty Company is a wholly owned subsidiary of Zurich American Insurance Company, a New York corporation. Zurich American Insurance Company is a wholly owned subsidiary of Zurich Holding Company of America, Inc., a Delaware corporation. Zurich Holding Company of America, Inc. is a 99.8711% owned subsidiary of Zurich Insurance Company, a Swiss corporation. Zurich Insurance Company is a wholly owned subsidiary of Zurich Group Holding, a Swiss corporation. Zurich Group Holding is owned 43% by Allied Zurich p.l.c. and 57% by Zurich Financial Services. Allied Zurich p.l.c. is a wholly owned subsidiary of Zurich Financial Services. Zurich Financial Services is the only publicly traded parent company, with a primary listing on the Swiss stock exchange and a secondary listing on the London stock exchange, and a further trading of American Depositary Receipts.

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OPINIONS BELOW

The unpublished Memorandum decision of the Court of Appeals for the Ninth Circuit is reprinted as Appendix A. The Ninth Circuit's Order denying Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* is not reported and is reprinted as Appendix B.

The order of the United States District Court for the Central District of California denying Respondent's Rule 50 Motion Regarding Punitive Damages is not reported and is reprinted as Appendix C.

JURISDICTION

The Ninth Circuit issued its Memorandum decision on May 21, 2004. On June 4, 2004, Petitioner filed a Petition For Panel Rehearing And Suggestion For Rehearing *En Banc*. Both petitions were denied on July 1, 2004.

The Court has jurisdiction to review the Ninth Circuit's judgment pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Overview Of The Case

This case arises from Respondent insurance company's wrongful denial of insurance benefits owed to Petitioner. At the trial, the jury found that Respondent's conduct constituted bad faith and that there was clear and convincing evidence of malice, fraud and oppression warranting imposition of punitive damages under California Civil Code § 3294(a). The jury awarded Petitioner $12,000,000 in punitive damages. The

District Court also awarded Petitioner attorney's fees – which are recoverable under California law when an insurance company is found to have acted in bad faith – in the amount of $332,402.50.[1]

In ruling on Respondent's Rule 50 motion, the District Court set forth fact-specific findings which demonstrated the existence of clear and convincing evidence of malice and oppression in two respects: (1) Respondent had engaged in despicable conduct with a willful and conscious disregard of the rights of Petitioner; and (2) Respondent had subjected Petitioner to cruel and unjust hardship in conscious disregard of its rights. The District Court's findings further established that there was clear and convincing evidence that Respondent's conduct constituted fraud.

On appeal, the Ninth Circuit panel issued a Memorandum decision which never addressed any of the specific factual findings which the District Court had held constituted clear and convincing evidence warranting the imposition of punitive damages. Rather, the Panel summarily concluded, without any other discussion of the facts:

> In this case, assuming arguendo that the insurance company did deny coverage in bad faith and failed to pay the roughly half-million dollars that it owed until being bludgeoned with a lawsuit, the evidence nevertheless does not permit the conclusion that California's strict punitive damage standard was met. Reasonable people could conclude that the insurance

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[1] After Respondent filed a separate appeal challenging the amount of attorney's fees, the parties stipulated to fix the amount at $315,782.39, with entitlement to them dependent upon whether the bad faith verdict was upheld.

> company was trying to chisel Ittella Foods, but they simply could not conclude that its conduct rose to the extreme level required by [California's] statutory standard.
> (Appendix A-5)

This cursory statement reflects the only purported explanation of why the Panel rejected the jury's verdict and the (never-even-mentioned) District Court's detailed findings that the verdict was supported by clear and convincing evidence. In refusing to indicate why the District Court's findings were clearly erroneous, the Panel drastically departed from the accepted and usual course of judicial proceedings.

Certiorari is warranted in order to consider whether this decision should be rejected as an affront to the very integrity of the judicial process.

II. Background of the Case

The only background facts which are necessary to consideration of this Petition are the District Court's detailed findings and those additional generalized facts necessary to give context to the Court's findings.

Petitioner Ittella Foods, Inc. is a food processing company that sells a number of products, including seafood salad. Ittella purchased insurance, including a CGL (commercial general liability) policy, from Respondent Northern Insurance Co., a wholly owned subsidiary of Zurich Insurance Company ("Northern").

In late September and early October, 2000, Petitioner distributed seafood salad product to Safeway outlets in the United States and Canada. The Canadian government took a routine sampling of Petitioner's seafood salad that was stored in a Safeway warehouse in Canada and determined that it contained positive traces of the bacteria *Listeria monocytogenes*. The letter from the Canadian Government advising Ittella of the findings indicated that they were treating "this issue" as a "Class II recall" -- a classification which did *not* require Ittella to take any action.

In order to avoid any health hazard to the public, Ittella voluntarily recalled and destroyed more than 100,000 pounds of possibly contaminated product; most from warehouses in the United States (that Canada had no jurisdiction over). In addition, Ittella consulted with a microbiologist regarding steps to take to rid its plant of *Listeria,* so that further contamination of its product would not occur. Finally, subsequent to destruction of the contaminated product, Ittella voluntarily notified the FDA about what had occurred and the steps they were taking to clean the plant.

Immediately after the problem arose, Ittella had its broker, Speare, notify Northern that it was making a claim for the value of the destroyed product and the temporary disruption of its business.

In October 2000, the original independent adjuster assigned to the claim notified Northern that the claim implicated a preliminary estimated product loss of $421,000. (Appendix C-4) In November, the second adjuster on the claim similarly notified Northern that Ittella was seeking coverage for both product loss under the [$4 million limits] Property Coverage section of the policy and product recall expenses. (Appendix C-4)

On November 9, 2000, Northern's management recognized that "the overall impact of the case is not product recall" and that the "big exposure is the first party [property coverage] claims by the insured." (Appendix C-4) Similarly, by December 14, the third adjuster (Myron Wasiunec) had concluded that the "product itself [was] not covered in [the] liability portion's product recall coverage;" i.e., it was not subject to the mere $50,000 liability limit of that coverage. (Appendix C-4)

Yet, on January 4, 2000, the adjuster, with the approval of his manager (Carol Stark), informed Ittella that the approximately $185,000 claimed loss for destroyed product was subsumed under the Product Recall Coverage Expense $50,000 limit of liability. (Appendix C-4-5) Northern never responded to the claim under the Property Coverage until January 29, 2001 when, in response to a letter from Ittella's broker challenging the efficacy of the denial of benefits articulated in the company's January 4 letter, it first mentioned and then applied three brand new purported exclusions -- Governmental Action; Ordinance or Law; and the Pollution Exclusion -- as a bar to coverage. (Appendix C-5) Stark approved this denial letter even though she admitted on cross-examination that she knew that the Governmental Action Exclusion only applied if a governmental seizure had occurred and that she realized that no government has seized any of Ittella's product. (Appendix C-5)

The District Court drew the following specific conclusions from the evidence:

(1) "Northern consciously avoided paying out under the Property Coverage despite knowing full well that was the 'big exposure' issue." (Appendix C-5)

(2) "[O]nce Northern finally realized that it would have to address Ittella's claim for the value of product loss under the first-party Property coverage provisions, it applied coverage exclusions [including] the Government Exclusion that it *knew* did not apply." (Appendix C-5) [italics in original]

(3) Northern "engaged in such actions even though it knew that the losses suffered by Ittella were significant." (Appendix C-5-6)

Having sat through the lengthy trial, the District Court found "that the above conclusions are not only 'consistent with the hypothesis of malice, fraud, gross negligence or oppressive' but are 'inconsistent with the hypothesis that such tortious conduct was the result of a mistake of law or fact, honest error or judgment, overzealousness, mere negligence, or other such noniniquitious human failing.'" (Appendix C- 6-7)

The District Court further found that its "conclusions also support the level of 'despicable conduct' required for malice and oppression and that there is a "high probability" that Northern carried on such conduct with a willful and conscious disregard of the rights of Ittella and subjected Ittella to cruel and unjust hardship in conscious disregard of Ittella's rights. (Appendix C-7)

Finally, the Court found that "the conclusions support a 'high probability' that Northern's conduct constituted fraud, both with respect to its attempt to con Ittella into believing that its product loss claim was covered by the Product Recall coverage and with respect to its claim that the Governmental Exclusion was applicable when the carrier knew otherwise." (Appendix C-7)

For all of these reasons, the District Court found that clear and convincing evidence supports the jury's verdict that Northern is guilty of malice, oppression or fraud, and denied Northern's Rule 50 motion. (Appendix C-7)

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Panel did not even attempt to reconcile its reversal of the punitive damages award with the findings of the District Court. Indeed, it did not even bother to mention the findings set forth in the lower court's decision, let alone to indicate why, allegedly, they were so clearly erroneous as to justify being entirely reversed. Instead, in summarily holding that no reasonable jury could have awarded *any* punitive damages at all, the Panel basically applied an "I-know-it-when-I-see- it" approach and never articulated why the punitive damages judgment warranted reversal.

The Opinion conflicts with U.S. Supreme Court precedent concerning the standard of review – and degree of deference – to be applied in reviewing the question of whether or not punitive damages may be assessed. (FRAP, Rule 35(a)(1).) The Panel's approach cannot be reconciled with the standard of review in punitive damages cases, as articulated by this Court in *Cooper Industries Inc. v. Lumberman Tool Group, Inc.*, 532 U. S. 424 [121 S. Ct. 1678] (2001).[2]

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[2] In fact, the Panel's approach conflicted with the Ninth Circuit's own standard, as reflected in the *en banc* decision in *Lambert v. Ackerly*, 180 F.3d 997, 1012 (9th Cir. 1999), in which the Ninth Circuit addressed the sufficiency of evidence supporting a punitive damages award and clearly stated: "[w]e cannot disturb the jury's verdict if it is supported by substantial evidence. (Citations omitted.)"

In *Cooper, supra,* 532 U. S. at 435 and 440, n. 14, this Court held that the factual findings made by the district courts in conducting an inquiry regarding punitive damages *must* be accepted "unless clearly erroneous . . . ." [3] The Memorandum decision made a mockery of that injunction.

Moreover, this Court's punitive damages case law has emphasized the due process rights of defendants. Here, it was the plaintiff whose due process rights were trampled. The Ninth Circuit Panel extinguished a significant property right – a duly entered jury verdict reviewed and approved by a District Court – without even bothering to explain why.

Even though the Panel's decision was not published, it is likely to have a major impact on the insurance industry. This decision will undoubtedly reverberate throughout the corporate boardrooms of carriers emboldened by the notion that they can cheat insureds out of benefits with impunity.

The Memorandum decision also tramples on principles of federal-state comity. The verdict was fully consistent with California's substantive insurance bad faith law codified in California Civil Code § 3294, which authorizes punitive damages where the trier of fact determines, by clear and convincing evidence, that the insurance carrier engaged in despicable conduct which: (1) subjected the insured to cruel and unusual hardship in conscious disregard of that person's rights [oppression]; (2) is carried on with a willful and conscious disregard of the rights of the insured [malice]; and/or (3) constitutes an intentional misrepresentation of a material fact with the intention of depriving the insured of its

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[3] In contrast, this Court held that the *proper amount* of punitive damages (as opposed to the propriety of awarding *any* punitive damages) was to be decided under a *de novo* standard. *Ibid.*

rights [fraud].[4] The Panel substituted its own view that punitive damages should not be awarded, despite the District Court's specific findings. It had no right to impose that view on California citizens.

The integrity of the judicial process is of principal importance. Intervention by the United States Supreme Court, through a grant of certiorari, is appropriate where, like here, a Court of Appeals has departed so drastically from the accepted and usual course of judicial proceedings that the entire judicial system is undermined. U.S. Supreme Court Rule 10(a).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED: September 10, 2004.

Respectfully Submitted,

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[4] As noted, *supra*, the District Court made precisely these factual conclusions in its Order denying Northern's Rule 50 motion for a new trial.

APPENDIX A

NOT FOR PUBLICATION

FILED
May 21, 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ITTELLA FOODS, INC.,
Plaintiff - Appellee,
v.
ZURICH INSURANCE COMPANY,
Defendant,
and,
NORTHERN INSURANCE CO. OF NEW YORK,
Defendant - Appellant.

No. 02-56383
D.C. No. CV-01-03620-LGB

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Argued and Submitted March 29, 2004
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: D.W. NELSON, FERNANDEZ, and KLEINFELD, Circuit Judges

Prior to trial, Northern Insurance paid Ittella Foods approximately $505,000 without reserving its rights or making any express agreement. The parties' stipulations in the final pretrial conference order following the district court's partial summary judgment highlight the significance of this payment. They "agreed on an amount of benefits – $445,000 – which were then paid by Northern Insurance Company with interest computed from January 5, 2001 to the date of payment."[1] They also agreed that there were no compensatory damages in dispute.[2] They further agreed that the only damages in dispute were those sought by Ittella Foods for attorney's fees, litigation costs, and punitive damages.[3] Thus, the parties did not contest any money owed on the policy; the only question was whether Northern Insurance's initial denials of coverage, prior to the subsequent payments, were in such egregious bad faith as to make it liable for punitive damages.

Bad faith can be refuted if no money is owed on a policy, or if, even though money is owed, the insurer's refusal to pay was reasonable and based upon a good faith dispute about the existence or extent of coverage.[4] In this case, we need not

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[1] *Ittella Foods, Inc. v. Zurich Insurnce Co.*, No. CV 01-03621-LGB (C.D. Cal. Apr. 29, 2002) (final pretrial conference order) (paragraph 5(K)).

[2] *Id.* (paragraph 7(C)(3)).

[3] *Id.* (paragraph 7(C)(1)).

[4] *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.*, 108 Cal.Rptr.2d 776, 784-85 (Cal. Ct. App. 2001); *Dalrymple v. United Servs. Auto. Ass'n*, 46 Cal.Rptr.2d 845, 857 (Cal. Ct. App. 1995).

reach a conclusion on whether Northern Insurance acted in bad faith because, under California law, a finding of bad faith is not sufficient to impose punitive damages.[5] California law distinguishes between misconduct amounting to bad faith,[6] and misconduct subjecting a party to liability for punitive damages.[7] Because only punitive damages are in dispute, we need only decide whether Northern Insurance's alleged misconduct supports an award of punitive damages.

Bad faith, which, as explained above, need not be decided, is a breach of the implied contractual covenant of good faith ad fair dealing.[8] If a party "injure[s] the right of the other to receive the benefits of the agreement," such as when an "'insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.'"[9]

For punitive damages, the standard is statutory. The California Civil Code provides that the plaintiff has to prove "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."[10] "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's

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[5] *Tomaselli v. Transamerica Ins. Co.*, 31 Cal.Rptr.2d 433, 440-41, 443-44 (Cal. Ct. App. 1994)

[6] *Chateau Chamberay*, 108 Cal.Rptr.2d at 783-85

[7] *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal.Rptr.2d 736, 756-57 (Cal. Ct. App. 2003).

[8] *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 818 (Cal. 1979).

[9] Id. (quoting *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 575 (Cal. 1973)).

[10] Cal. Civ. Code § 3294(a).

rights."[11] "'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."[12] "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others."[13] Dispicable conduct is conduct so "vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people," and "[has] the character of outrage frequently associated with crime."[14] "'Something more than the mere commission of a tort is always required for punitive damages.'"[15]

"[P]unitive damages have been assessed against insurance companies most commonly where a showing has been made of a continuous policy of nonpayment of claims."[16] Bad faith can be found on a more probable than not standard, but a punitive damage award requires clear and convincing evidence.[17] To be clear and convincing, the evidence has to be

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[11] *Id.* § 3294(c)(2).

[12] *Id.* § 3294(c)(3).

[13] *Id.* § 3294(c)(1).

[14] *Tomaselli*, 31 Cal.Rptr.2d at 444 (internal quotation marks omitted).

[15] *Taylor v. Super. Ct. of L.A. County*, 24 Cal.3d 890, 894 (Cal. 1979) (quoting Wm. Prosser, Law of Torts § 2 (4th ed. 1971)).

[16] *Tomaselli*, 31 Cal.Rptr.2d at 444

[17] Cal. Civ. Code § 3294(a).

"so clear as to leave no substantial doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind."[18] A mistake of law by an insurance company, an honest error of judgment, overzealousness, or negligence cannot support punitive damages.[19] Where there is nothing done that is "evil, criminal, recklessly indifferent to the rights of the insured, or with a vexatious intention to injure," a punitive damages award must be reversed.[20]

In this case, assuming arguendo that the insurance company did deny coverage in bad faith and failed to pay the roughly half-million dollars that it owed until being bludgeoned with a lawsuit,[21] the evidence nevertheless does not permit the conclusion that California's strict punitive damage standard was met. Reasonable people could conclude that the insurance company was trying to chisel Ittella Foods, but they simply could not conclude that its conduct rose to the extreme level required by the statutory standard. We cannot say that the evidence was so one-sided as to meet the clear and convincing standard for the sort of conduct to which the California punitive damages standard is limited.

Accordingly, the judgment is AFFIRMED as to the compensatory damages, the judgment is REVERSED as to the punitive damages, and the judgment is VACATED so the

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[18] *In re Angelia P.*, 623 P.2d 198, 204 (Cal. 1981) (internal quotations omitted).

[19] See *Tomaselli*, 31 Cal.Rptr.2d at 444 n.14.

[20] *Id.* at 445.

[21] If the issue *were* properly before us for decision, we would be constrained to say that the evidence was not sufficient to support a tortious breach of the covenant of good faith and fair dealing.

district court can strike the punitive damages. Each party shall bear its own costs on appeal.

FILED
July 01, 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ITTELLA FOODS, INC.,
Plaintiff - Appellee,
v.
ZURICH INSURANCE COMPANY,
Defendant,
and,
NORTHERN INSURANCE CO. OF NEW YORK,
Defendant - Appellant.

No. 02-56383
D.C. No. CV-01-03620-LGB
Central District of California, Los Angeles

ORDER

Before: D.W. NELSON, FERNANDEZ, and KLEINFELD, Circuit Judges

We deny the petition for rehearing of appellant Northern Insurance. The memorandum disposition will not be amended because the only relief at issue in this case is the punitive damages award. Appellant conceded that it was not seeking to recover any money paid on the policy for which bad faith was claimed. In addition, counsel advised us that a separate appeal regarding attorneys' fees (03-55111) was filed,

mediated, and settled. The settlement assumed that our appeal would decide the issue of bad faith, but that decision was unnecessary to our resolution of the appeal before us. That the issue of bad faith was briefed, and that the parties assumed (in their settlement agreement for a separate appeal on attorneys' fees) that this panel would decide the issue, do not make that issue necessary for decision.

We deny the petition for rehearing of appellee Ittella Foods.

Judge Kleinfeld has voted to deny appellee's petition for rehearing en banc, and Judges D. Nelson and Fernandez have recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed R. App. P. 35(b).

The petitions for rehearing and the petition for rehearing en banc are DENIED.

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FILED
Clerk, U.S. District Court
JUL 25 2002
Central District of California
By /s/ (initials) Deputy

ENTERED
Clerk, U.S. District Court
JUL 26 2002
Central District of California
By /s/ (initials) Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ITTELLA FOODS, INC.,
Plaintiff,

v.

ZURICH INS. CO., ET AL.,
Defendants.

CV 01-3620 LGB (PLAx)

ORDER DENYING DEFENDANT'S RULE 50 MOTION REGARDING PUNITIVE DAMAGES

Defendant Northern Insurance Company of New York (Northern") brings the instant motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 regarding the jury's verdict, rendered after a trial on Ittella's breach of covenant of good faith and fair dealing claim, that

plaintiff Ittella Foods, Inc. ("Ittella") is entitled to punitive damages under California Civil Code § 3294.[1]

Under Federal Rule of Civil Procedure 50, this Court can overturn the jury and grant Northern's motion only if, under the governing law, there can be but one reasonable conclusion as to the verdict. In other words, the motion should be granted only if "there is no legally sufficient basis for a reasonable jury to find for that party on that issue." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000). In ruling on the Rule 50 motion, the Court must accept the jury's credibility findings consistent with the verdict and may not substitute its view of the evidence for that of the jury. *Id.* at 151.

Under California law, the governing law in this case, punitive damages are recoverable where it has been found, by clear and convincing evidence, that Northern is guilty of oppression, fraud, or malice. Cal. Civ. Code § 3294. Both malice and oppression are defined as involving "despicable conduct" which, in the case of malice, is carried on by the defendant with a willful and conscious disregard of the rights or safety of others and, as to oppression, is conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. *Id.* Despicable conduct is defined as conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people. *Tomaselli et al. v. Transamerica Ins. Co.*, 25 Cal.App.4th 1269, 1287 (1994). Such conduct has been described as "[having] the character of outrage frequently associated with crime." *Id.* Fraud means an intentional misrepresentation,

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[1] On July 3, 2002, after a one-day punitive damages trial, the jury awarded Ittella $12 million in punitive damages.

deceit or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. Cal. Civ. Code § 3294. The clear and convincing standard requires a finding of "high probability . . . requiring that the evidence be "so clear as to leave no substantial doubt; sufficiently strong to command an unhesitating assent of every reasonable mind." *Tomaselli,* 25 Cal.App.4th at 1287-88. In applying the standards governing Rule 50 and punitive damages, this Court thus should grant Northern's Rule 50 motion only if there is no legally sufficient basis for a reasonable jury to find that the evidence is so clear as to leave no substantial doubt that Northern is guilty of oppression, malice or fraud.

Having reviewed Ittella's responsive papers to Northern's Rule 50 motion including its "objections" to this Court's tentative order granting Northern's motion,[2] the Court finds

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[2] Northern submitted a request to strike Ittella's "objections" to the Court's tentative order on the grounds that the Court only agreed to allow the parties to submit citations to evidence and not any argument. Northern's Request to Strike Ittella's Objections at 2. In the alternative, Northern requested that the Court grant it an opportunity to respond to Ittella's objections and to provide additional argument, authorities, and evidence in support of its motion. *Id.* The Court subsequently granted leave for Northern to file such a response and on July 16, 2002, Northern filed its "Response to Plaintiff's Objections and Supplement to its Objections" ("Northern's Final Response") which included additional argument, authorities, and evidence in support of its Rule 50 motion. On July 18, 2002, the Court also received Ittella's "reply brief" to Northern's response. This filing, along with Ittella's July 11, 2002 "Supplement to its Objections to the Court's Tentative Order," however, was not authorized by the Court an as such, both documents are STRICKEN and will not be considered by the Court. The parties are seriously cautioned against needlessly and excessively multiplying the proceedings by filing unauthorized documents. 29 U.S.C. § 1927. Both parties have been

that Ittella's argument with regards to each of the malice, oppression, and fraud prongs centers around three points: (1) that Northern purposefully indicated that the value of the destroyed product was covered by the product recall coverage even though it knew there was "absolutely" no basis in the policy to reach such a conclusion, (2) that Northern ignored Ittella's claim under the first-party property coverage provisions of the policy, and (3) that Northern applied the governmental action and ordinance or law exclusions even though it knew that the "threshold" conditions had not occurred.

The record, when viewed in the light most favorable to Ittella, reveals that in October of 2000, the original independent adjuster assigned to Ittella's claim, Gary Brown of Maxson Young, recognized and notified Northern that the claim implicated a preliminary estimated product loss of $421,000, Exhibit 29; that in November of 2000, the second adjuster on the claim, Rich Dugo of the San Francisco Property Office, similarly acknowledged and notified Northern that Ittella was seeking coverage for both product loss under Section 1 of the Property Coverage portion of the policy and product recall expenses due to listeria contamination, Exhibit 50; and that on November 9, 2000, management in Northern's Property Office structure recognized that "the overall impact of the case is to product recall" and that the "big exposure is the first party Claims by the insured," Exhibit 30. In a similar vein, the record also shows that by December 14, 2000, Myron Wasiunec of the Pollution Unit had concluded that the "product itself [was] not covered in [the] liability portion's product recall coverage," Exhibit 58. Yet, on January 4, 2000, Wasiunec, with Carol Stark's approval, informed Ittella

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given enough opportunities to submit argument, evidence, and citations regarding Northern's Rule 50 motion, both in written and oral form.

that the $171,599.05 claimed loss for the product sold to Sam's Club and subsequently destroyed, and the $13,022.35 claimed loss for the product destroyed at the Safeway-NorCal warehouse were subsumed under the Product Recall Coverage Expense sublimit of $50,000, Exhibit 61. Evidence was also introduced at trial to show that Northern never addressed Ittella's claim under the Property Coverage portion of the policy until January 29, 2000 when Northern, for the first time, applied the Government Exclusion, Ordinance or Law Exclusion, and the Pollution Exclusion to bar coverage, Exhibit 82. Carol Stark, who expressly approved the January 4th and 29th letters and who was authorized by Northern to make the coverage decision on behalf of the carrier conceded on cross-examination that she knew that the Governmental Exclusion only applied if a governmental seizure had occurred and that she realized that no government had seized any of Ittella's product. May 22, 2002 Transcripts at 64:6-64:15. Consistent with the jury's verdict, the Court assumes that the jury did not believe Stark's explanation that she nevertheless believed the exclusion was applicable based on her "prior knowledge" of how recalls work to be credible.

The conclusions to be drawn from the aforementioned pieces of evidence, when viewed in the light most favorable to Ittella and resolving all credibility determinations in line with the jury's verdict against Northern, is that: (1) Northern consciously avoided paying out under the Property Coverage despite knowing full well that was the "big exposure" issue, (2) Northern delayed in addressing Ittella's claim for the value of product loss under the Property Coverage provisions of the policy, (3) once Northern finally realized that it would have to address Ittella's claim for the value of product loss under the first-party Property coverage provisions, it applied coverage exclusions even the Government Exclusion that it *knew* did not apply, and (4) it engaged in such actions even though it

knew that the losses suffered by Ittella were significant. Exhibit 17 to Pl's Supplemental Citations, Sam Galletti's Letter. In so concluding, the Court disagrees with Northern that the evidence presented at trial supports the contention that Ittella and its agents had initially characterized its *entire* loss as falling within the Product Recall coverage. Northern's Final Response at 1. In any event, such evidence would not detract from the fact that Northern's own brokers subsequently recognized that the "big exposure issue" was the Property Coverage provisions of the policy and the fact that this recognition occurred prior to Northern's written determination that the insurer would pay out under the Product Recall Coverage only. Though Northern argues that it continued to work on Ittella's claim for destroyed product after January 4, 2000, the only evidence that it points to as support merely shows that it had stated to Ittella that it would consider any "new information received" and that it encouraged Ittella to submit "additional information" concerning the business interruption loss claim, Exhibit 62, January 4, 2000 Letter at 323; Exhibit 69, January 5, 2002 Letter at 332; Exhibit 71, Wasiunec e-mail. Furthermore, there is no evidence in the record to support Northern's claim that it had requested coverage opinions. Northern's Final Response at 8. Despite Northern's protests to the contrary, the fact that the FDA "would have sized Ittella's unsafe and contaminated product if it refused to remove it from the marketplace" does not satisfy the threshold conditions for applying the Government Exclusion. *Id.*

The Court finds that the above conclusions are not only "consistent with the hypothesis of malice, fraud, gross negligence, or oppressiveness" but are " inconsistent with the hypothesis that such tortious conduct was the result of a mistake of law of fact, honest error or judgment, overzealousness, mere negligence, or other such noniniquitious

human failing." *Tomaselli*, 25 Cal.App.4th at 1288 n.14. The conclusions also support the level of "despicable conduct" required for malice and oppression and the Court finds that there is a "high probability" that Northern carried on such conduct with a willful and conscious disregard of the rights of Ittella and subjected Ittella to cruel and unjust hardship in conscious disregard of Ittella's rights. In additional, the conclusions support a "high probability" that Northern's conduct constituted fraud, both with respect to its attempt to con Ittella into believing that its product lossclaim was covered by the Product Recall coverage and with respect to its claim that the Governmental Exclusion was applicable when the carrier knew otherwise. Pl's Objections to Court's Tentative at 10.

Based on the foregoing, the Court DENIES Northern's Rule 50 motion and finds that clear and convincing evidence supports the jury's verdict that Northern is guilty of malice, oppression, or fraud.

IT IS SO ORDERED.

Dated: July 25, 2002

/s/ Lourdes G. Baird
LOURDES G. BAIRD
United States District Judge

(2)

No. 04-399

Supreme Court, U.S.
FILED
NOV 1 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ITTELLA FOODS, INC.,
Petitioner,

vs.

ZURICH INSURANCE COMPANY and
NORTHERN INSURANCE CO. OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF OF ITTELLA'S FOODS, INC.

I. THE DISTRICT COURT'S RECENT DECISION DENYING NORTHERN'S RULE 60 MOTION DETAILS THE EVIDENCE CONSIDERED BY THE JURY AND TRIAL COURT AND IGNORED BY THE NINTH CIRCUIT

Subsequent to Ittella filing its Petition for Writ of Certiorari, the District Court ruled on Respondent's Rule 60 Motion Re: Breach Of Covenant Of Good Faith And Fair Dealing. This additional opinion is reprinted as Appendix D.

While not directly relevant to Petitioner's challenge to the Ninth Circuit Panel's punitive damage ruling, the decision is worth noting because it details the evidence which led the jury and District Court Judge to find that there was clear and convincing evidence that Respondent had acted with malice, fraud and oppression; evidence which, as the District Court noted, was not even addressed by the Panel. Comparison of this factually detailed and thoroughly reasoned decision with the Panel's factually vacant Memorandum underscores the extent to which the Panel deviated from the mandated standard in punitive damage cases of accepting the factual findings of the District Court unless clearly erroneous. *Cooper Industries Inc. v. Lumberman Tool Group, Inc.*, 532 U.S. 424 [121 S. Ct. 1678] (2001).

The Petition for a Writ of Certiorari should be granted.

DATED: November 1, 2004.

Respectfully Submitted

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Priority √
Send √
Clsd √
Enter √
JS-5/JS-6 _____
JS-2/JS-3 _____

FILED
Clerk, U.S. District Court
OCT 26 2004
Central District of California
By /s/ (initials) Deputy

ENTERED
Clerk, U.S. District Court
OCT 27 2004
Central District of California
By /s/ (initials) Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ITTELLA FOODS, INC.,

Plaintiff,

v.

ZURICH INSURANCE COMPANY, et al.,

Defendants.

CV 01-3620 LGB (PLAx)

ORDER DENYING DEFENDANT'S RULE 60 MOTION RE; BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

I. INTRODUCTION

Plaintiff Itella Foods, Inc. ("Ittella") sued Defendant Northern Insurance Company ("Northern") for breach of an insurance contract. A jury found that Northern breached the contract and had acted with "malice, oppression or fraud." The jury also awarded punitive damages to Ittella. Northern sought to nullify the jury verdict by a Rule 50 motion for judgment as a matter of law. This Court denied Northern's motion, finding instead that the jury verdict was supported by the record at trial.

Northern appealed the finding of bad faith and punitive damages to the Ninth Circuit. While the appeal was pending, Northern and Ittella signed a settlement agreement ("Agreement") concerning attorney's fees. The Agreement pegs Northern's liability for Ittella's attorneys' fees on the Ninth's Circuit's decision on the issue of bad faith.

The Ninth Circuit subsequently reversed the punitive damages award but declined to rule on the issue of bad faith. Northern asked the court to reconsider its ruling in light of the Agreement. The Ninth Circuit refused to reconsider its ruling.

Northern filed this Rule 60(b) motion to seek relief from the Court's rulings regarding bad faith. Ittella opposes.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Policy and Recall

The facts of the case are pertinent to the current attorneys' fees dispute, so a brief rendition of those facts is appropriate here.

Ittella is a food processing company which manufactures two separate products in one plant – seafood salad and salsa. (Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Adjudication ("Pltf.'s Statement in Support of Motion for SA") ¶¶ 1-2). On April 12, 2000, Defendant issued a business insurance policy number CNM 98520225 ("the Policy"), to Ittella. (Pltf.'s Statement in Support of Motion for SA ¶ 3; Defendant's Statement in Opposition to Motion for Summary Adjudication ("Def.'s Statement in Opposition") ¶ 3.) The Policy consists of a business suite of policies including Commercial Property coverage, Commercial General Liability ("CGL") coverage, and Commercial Automobile coverage. (Pltf.'s Statement in Support of Motion for SA ¶ 4; Def.'s Statement in Opposition to Pl's Motion ¶ 4.) The Policy covered the period of April 12, 2000 through April 2001. (Pltf.'s Statement in Support of Motion for SA ¶¶ 5-6; Def.'s Statement in Opposition ¶¶ 5-6.)

On October 2, 2000, the Canadian government took a routine sampling of Ittella's Seafood Salad that was stored in a Lucerne Foods (Safeway) warehouse in Canada. (Pltf.'s Statement in Support of Motion for SA ¶ 12; Def.'s Statement in Opposition") ¶ 12.) On October 16, 2000, Ittella was orally notified that the product had tested positive for Listeria Monocytogenes ("Listeria"). (Pltf.'s Statement in Support of Motion for SA ¶ 13; Def.'s Statement in Opposition ¶ 13.) Listeria is a pathogenic food contaminant which can cause damage to human beings. (Pltf.'s Statement in Support of Motion for SA ¶ 15; Def.'s Statement in Opposition to Pltf.'s Motion ¶ 15.)

On October 17, 2000, the Canadian government advised Ittella that it was issuing a Class II recall requiring all retailers to take the product off the shelf, but the recall did not require

Ittella to take any action. (Pltf.'s Statement in Support of Motion for SA ¶ 14; Def.'s Statement in Opposition ¶ 14.) Itella subsequently advised Lucerne to immediately destroy any Seafood Salad on the retail store shelves in Canada and to return any products stored in their warehouses. (Pltf.'s Statement in Support of Motion for SA ¶ 16; Def.'s Statement in Opposition") ¶ 16.) Ittella also immediately recalled and destroyed the Seafood Salad product with the same use date that had been delivered in the United States to Safeway divisions in Clackamas, Oregon, and Bellevue, Washington. (Pltf.'s Statement in Support of Motion for SA ¶ 17; Def.'s Statement in Opposition ¶ 17.)

After performing independent tests, Ittella discovered that the source of the Listeria was diced onions from a third party supplier. (Pltf.'s Statement in Support of Motion for SA ¶ 21; Def.'s Statement in Opposition ¶ 21.) Ittella decided to voluntarily recall all Seafood Salad from later batches which had tested positive for Listeria. (Pltf.'s Statement in Support of Motion for SA ¶ 23; Def.'s Statement in Opposition ¶ 23.) The contaminated product was returned to Ittella's plant, and Ittella destroyed the returned product along with the remaining undistributed product which was at the plant. (Pltf.'s Statement in Support of Motion for SA ¶¶ 24-25; Def.'s Statement in Opposition ¶¶ 24-25.) On the advice of the lab which performed the additional tests, Ittella suspended Seafood Salad production for approximately two weeks. (Pltf.'s Statement in Support of Motion for SA ¶ 31; Def.'s Statement in Opposition ¶ 31.)

Ittella submitted a claim to Northern seeking benefits under the Policy for all covered losses stemming from the tainted Seafood Salad. (Pltf.'s Statement in Support of Motion for SA ¶ 33; Def.'s Statement in Opposition ¶ 33.) On December 5, 2000, Northern paid Ittella a portion of the

claim pursuant to the Product Recall Expense coverage of the CGL portion of the Policy. (Pltf.'s Statement in Support of Motion for SA ¶ 35; Def.'s Statement in Opposition ¶ 35.)

On January 5, 2001, Myron Wasiunec ("Wasiunec"), an account specialist handling the matter on behalf of Northern, advised Ittella that Northern was willing to pay the rest of the $50,000 policy limit for product recall expense coverage and $3,087.69 for charges associated with the dumping and destruction of the product under Personal Property coverage. (Pltf.'s Statement in Support of Motion for SA ¶¶ 37-38; Def.'s Statement in Opposition ¶¶ 37-38.) Northern ultimately paid Ittella the policy limit of $50,000 for product recall expense coverage. (Pltf.'s Statement in Support of Motion for SA ¶ 37; Def.'s Statement in Opposition ¶ 37.)

However, Wasiunec said Northern was denying coverage for product and environmental testing, attorney's fees, and Itella's submission of $435,371.59 for business interruption loss. (Pltf.'s Statement in Support of Motion for SA ¶ 36; Defendant's Statement in Support of Defendant's Summary Judgment Motion ("Def.'s SJ Statement") ¶ 19; see Exhibit 7 to Dec. of Biren in Support of Pltf.'s Motion for SA; Exhibit 10 to Dec. of Patterson in Support of Def.'s SJ Motion.) On January 5, 2001, Ittella's insurance broker wrote to Wasiunec requesting that he reconsider Ittella's claim, arguing that: 1) the product value should not be included with the Product Recall expense but rather is covered by the Business Personal Property, for which Ittella had $4,475,000 coverage; 2) the suspension of operations at the plant qualified as a business interruption, entitling the insured to recover lost income; and 3) microbiology consultant and cleanup expenses should be covered as extra expenses under the Business Income and Extra Expense portion of the Business Personal Property Form. (Pltf.'s Statement in Support of Motion for SA ¶ 41;

Def.'s Statement in Opposition ¶ 41.)

On January 29, 2001, Wasiunec decided that even if the contaminated product was "covered property," which Northern denied, it was nonetheless subject to Policy exclusions including those for Ordinance or Law, Governmental Action, and Pollution. (Pltf.'s Statement in Support of Motion for SA ¶ 43; Def.'s Statement in Opposition ¶ 43; see Exhibit 9 to Dec. of Biren in Support of Pltf.'s Motion for SA; Exhibit 12 to Dec. of Patterson in Support of Def.'s SJ Motion.)

Ittella filed a Complaint against Northern in Los Angeles Superior Court on February 28, 2001. The Complaint alleged that Northern breached both the insurance contract and the covenant of good faith and fair dealing. (Complaint at 3-4.) Ittella sought damages, attorneys' fees, and other costs. (*Id.* at 5.) The case was removed to this Court on April 24, 2001.

B. Pre-Trial: The Court Denies Northern's Motion for Summary Judgment on Issue of Bad Faith

Prior to jury trial, on January 18, 2002, Northern moved for Summary Judgment on the issue of bad faith. Northern argued that there was no basis for Ittella's bad faith cause of action because Northern's denial of coverage was reasonable. (Def.'s SJ Motion at 18-19.) In considering Northern's motion, this Court held that two genuine issues of fact precluded the granting of summary judgment. First, the Court noted that under California law the adequacy of the insurer's investigation is one of the most critical factors in analyzing a bad faith claim. (Order Denying Defendant's Motion for Summary Judgment ("SJ Order") at 27.) The Court also noted that "the parties dispute whether Defendant denied

Ittella's claim without conducting any research." *Id.* at 27-28.

Second, the Court observed that both the Policy's Product Recall Expense Coverage and its Building and Personal Property Coverage contained pollution exclusions. *Id.* at 28. The Court further noted that Northern had agreed to pay the full amount of the Recall coverage while steadfastly refusing to pay anything under the Property coverage. *Id.* Given this state of events, the Court ruled that "genuine issues exist as to whether this shift constitutes an arbitrary cut-off of insurance benefits and thus, bad faith on the part of Defendant." *Id.*

C. The Jury Verdict and Northern's Rule 50 Motions

Jury trial was bifurcated into two stages. The first stage concerned whether Northern breached the implied duty of good faith and fair dealing and, additionally, whether this breach was done with malice, oppression or fraud. *See* Joint Special Verdict Form of May 23, 2002. The latter finding is required before a party can be held liable for punitive damages under California law.

The second stage of the trial concerned whether punitive damages would be awarded and, if so, the amount of such damages. *See* Joint Special Verdict Form II of July 3, 2002.

1. The Jury Finds that Northern Acted in Bad Faith; the Court Denies Northern's Rule 50(a) Motion as to Bad Faith and Punitive Damages Liability

Trial commenced on May 14, 2002. After the close of evidence in the first phase of trial, Northern filed a Motion for Judgment as a Matter of Law under F.R.Civ.P. 50(a). (Court's Civil Minute Order May 22, 2002.) The Court denied the motion as to good faith and fair dealing, but took the matter under submission as to punitive damages. *Id.*

The jury rendered a verdict for the plaintiff on May 23, 2002, and the Court entered Judgment on the jury verdict on July 8, 2002. The Court then reconsidered Northern's Rule 50 motion as to punitive damages. Since the Court's punitive damages analysis is pertinent to its bad faith analysis, the Court's reasons for denying Northern's Rule 50 motion will be recounted here.

As required under Rule 50, the Court examined the trial record in the light most favorable to the non-movant, Ittella. The Court noted several facts in the trial record which supported the jury's verdict. First, in October and November of 2000 the first two Northern adjusters notified Northern that Ittella was seeking coverage for both product loss and recall expenses. (July 25, 2002 Order Denying Defendant's Rule 50 Motion Regarding Punitive Damages ("July 25 Order") at 4.) Wasiunec also later concluded that the product was a separate loss that was not covered in the Policy's Recall coverage. *Id.* The Court noted that these determinations were in conflict with Northern's January 4, 2000 decision to tell Ittella that the product claims were subsumed under the Recall coverage and therefore subject o a $50,000 limit *Id.*

Second, Carol Stark, the Northern employee who expressly approved the January 4, 2000 decision, conceded on cross-examination that, under the actual language of the Governmental Exclusion stated, the exclusion applied only if there was a "seizure" of the product. *Id.* at 5; May 22, 2002 Transcripts at 63-64:22-3. Stark admitted the government did not "seize" the product. (May 22, 2002 Transcripts at 64:10-12.) Stark said she nonetheless believed that the exclusion applied because of her understanding of how prior recalls worked, but the Court reasoned that the jury could have disbelieved Stark's explanation. (Order re: Punitive Damages at 5.)

Third, the Court cited the lack of evidence in support of Northern's allegation that it worked diligently on the Ittella claim. The Court noted that there was "no evidence in the record" to support Northern's claim that it had requested coverage opinions. *Id.* at 6. There was also no evidence that Northern continued to work on Ittella's claim after January 4, 2000. *Id.*

Based on these facts the Court held that there was a sufficient basis for the jury to find that Northern: 1) consciously avoided paying out under the Property Coverage despite knowing it was Ittella's primary claim, 2) delayed addressing Ittella's product losses, 3) applied coverage exclusions that it knew did not apply, and 4) engaged in such actions even though it knew Ittella's losses were significant. (Order re: Punitive Damages at 5.) The Court concluded that "clear and convincing evidence supports the Jury's verdict that Northern is guilty of malice, oppression or fraud." Id. at 7. Accordingly, the Court denied Northern's motion.

After denying Northern's motion, the court held a one-day trial on the issue of punitive damages. After this second stage of trial, the jury found that punitive damages should be

assessed against Northern. The jury awarded Ittella $12,000,000 in punitive damages.

2. Northern Renews Its Rule 50(b) Motion for Judgment as a Matter of Law on the Issues of Bad Faith and Punitive Damages Liability; the Court Denies the Motion

After the jury reached its verdict, Northern filed a Rule 50(b) Motion and requested judgment as a matter of law on the issues of bad faith and punitive damages liability. The Court found no merit in Northern's argument, noting that:

> Northern rehashes much of the arguments it had brought fourth in its Rule 50(a) motion concerning punitive damages. Those arguments were rejected by this Court for the reasons stated in the July 25, 2002 order, and Northern does not provide anything here to sway this Court to change its mind. The Court, at bottom, finds that sufficient evidence supports both a finding of bad faith denial of benefits and malice, oppression and/or fraud to support the jury's verdicts in both Phase One and Phase Two of the instant action.

(August 2, 2004 Order Denying Northern's Motion for Judgment After Trial Pursuant to Rule 50(b).)

D. Northern Appeals the Judgment; the Court Subsequently Awards Attorneys' Fees to Ittella; Northern Appeals the Award

Northern appealed the Judgment to the Ninth Circuit on August 9, 2002.

Five days later, Ittella moved for the Court to set the amount of attorneys' fees based on the jury's finding of bad faith. The Court awarded attorneys' fees of $332,402.50 to Ittella on December 12, 2002. Northern appealed the award on December 17, 2002.

While both of Northern's appeals were still outstanding, the parties entered into a Conditional Settlement Agreement ("Agreement") with respect to attorneys' fees. The Agreement discharged the attorneys' fees appeal before the Ninth Circuit. The Agreement also specified that:

- 1. "In the event that the Ninth Circuit Court of Appeals upholds the judgment as to bad faith on appeal or after retrial, the parties agree that NORTHERN shall pay attorneys' fees in the amount of $315,782.38 as a compromise of appeal no. 02-56383; plus simple interest at the statutory rate from the date judgment on the attorneys' fees order was entered (December 17, 2002).

- 2. "In the event that the Ninth Circuit does not uphold the judgment as to bad faith on appeal or after retrial, the

parties agree that NORTHERN owes no attorneys' fees pursuant to the December 17 order.

- 3. "In either event, ITTELLA agrees that this Agreement supercedes the District Court's December 17, 2002 award and ITTELLA will not seek to enforce that award. ITTELLA releases all claims it may have to any attorneys' fees arising from case No. CV-01-03620-LGB (PLAx), subject to Paragraph 1, above, with the exception that if the case is remanded for further trial on the bad faith claim, ITTELLA reserves the right to claim attorneys' fees if it again prevails on that issue . . . ."

E. The Ninth Circuit's Memorandum Opinion Reverses Punitive Damages But Does Not Rule on Bad Faith or Attorneys' Fees

On March 29, 2004, the Ninth Circuit Court of Appeals issued an unpublished Memorandum on Northern's appeal of the Judgment in this case. The court noted that "the only damages in dispute were those sought by Ittella Foods for attorneys' fees, litigation costs, and punitive damages," but the court nonetheless limited its analysis to the issue of punitive damages only. (Memorandum at 2.) The court expressly avoided dealing with the jury's finding of bad faith, stating that "we need not reach a conclusion on whether Northern Insurance acted in bad faith because, under California law, a finding of bad faith is not sufficient to impose punitive

damages." *Id.* at 3. The Ninth Circuit panel's clearest reference to the issue of bad faith was in a footnote which stated that "If the issue [of bad faith] *were* properly before us for decision, we would be constrained to say that the evidence was not sufficient to support a tortious breach of the covenant of good faith and fair dealing." *Id.* at 6, fn. 21 (emphasis original).

The Court's analysis instead focused on the state's punitive damages standard, which requires "clear and convincing" evidence of "oppression, fraud, or malice." *Id.* at 4. Although the court did not specifically address any evidence offered at trial and considered by the jury or the district court, it nonetheless determined that there was insufficient evidence to support the punitive damages award. *Id.* at 6-7. The court affirmed the compensatory damage award, reversed the punitive damages award, and remanded the case to this Court. *Id.* at 7.

F. The Ninth Circuit Denies Northern's Petition for Rehearing

Northern filed a Petition for Rehearing ("Petition") on the issue of bad faith on June 4, 2004. Northern asked the Ninth Circuit to reconsider its decision that the issue of bad faith was not properly before it, pointing out that the court had noted that "attorneys' fees" were in dispute. (Petition at 3, fn. 1.) Northern also explained that the parties' settlement agreement was pegged to the issue of bad faith, and that the court's failure to make a finding on bad faith would leave the issue unresolved. *Id.* at 1.

The Ninth Circuit denied the Petition. the court noted that "Appellant [Northern] conceded that it was not seeking to recover any money paid on the policy for which bad faith

was claimed." (Ninth Circuit Order at 1.) The court also noted that "counsel advised us that a separate appeal regarding attorneys' fees (03-55111) was filed, mediated, and settled." *Id.* The court stated that it was denying the Petition because "the only relief at issue in this case is the punitive damages award." *Id.*

This Court held a hearing on August 19, 2004, to spread the Ninth Circuit's Mandate. After the Court reversed the $12 million punitive damages award, the parties informed the Court that the issue of attorneys' fees was still unresolved. The Court instructed Northern to file a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). The Court then set an expedited briefing schedule on the motion.

Northern filed its Rule 60 Motion and accompanying Memorandum of Points and Authorities ("Motion") on August 27, 2004. Ittella filed an Opposition Memorandum of Points and Authorities ("Opposition") on September 3, 2004. Northern filed its Reply Memorandum of Points and Authorities ("Reply") on September 8, 2004.[1]

G. Northern's Motion

Northern filed the instant Motion under Federal Rule of Civil Procedure 60(b). Northern makes four arguments.

First, Northern argues that this Court has the discretion to revisit its prior rulings on the issue of bad faith. Those rulings are: a) the April 5, 2002 Order Denying Defendant's

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[1] Ittella subsequently filed a Surreply ad Supplemental Surreply. It admitted there was no procedural basis for the additional filings, and this Court agrees. The Court therefore declines to consider the additional Ittella filings as well as Northern's Objection to the Surreplies.

Motion for Summary Judgment on the issue of bad faith ("April 5 SJ Order"); and b) the May 23, 2002 denial of Northern's motion for judgment as a matter of law on the issue of bad faith ("May 23, Denial").[2]

Second, Northern argues that this Court should act in equity and reverse those prior rulings. Northern cites in its support both the Ninth Circuit's footnote 21 and two California cases which were decided after this Court ruled on the original motions in 2002.

Third, Northern argues that it does not owe Ittella any attorneys' fees under the terms of the Settlement Agreement.

Fourth and finally, Northern argues that the Settlement Agreement is too vague to be enforced. Northern urges the Court to reform the Agreement to provide that Northern will only owe attorneys' fees if the Ninth Circuit "agrees" that Northern acted in bad faith.

III. APPLICABLE LAW

A. Federal Rule of Civil Procedure 60(b)

Under Federal Rule of Civil Procedure 60(b), the Court may relieve a party from a final judgment, order or proceeding for one of six enumerated reasons, including "newly discovered evidence," F.R.Civ.P. 60(b)(2), or "any other reason justifying relief from the operation of the judgment," F.R. Civ.P. 60(b)(6). Northern has not specified which subsection of Rule 60(b) it depends on for this motion, but it appears that subsection (6) is the most applicable here.

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[2] The Court did not issue a written order when it denied Northern's motion on May 23.

A court may grant relief from a judgment under Rule 60(b)(6) "only where extraordinary circumstance prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir*, 984 F.2d 1047, 1049 (9th Cir. 1993). "Rule 60(b)(6) relief normally will not be granted unless the moving party is able to show both injury and that circumstances beyond its control prevented timely action to protect its interest." *Id.*; *see also Martella v. Marine Cooks and Stewards Union, Seafarers Intern. Union of North America, AFL-CIO*, 448 F.2d 729, 730 (9th Cir. 1971) ("In order to bring himself within the limited area of Rule 60(b)(6) a petitioner is required to establish the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal.")

IV. ANALYSIS

A. The Court has the Discretion to Revisit its Prior Rulings

1. The Ninth Circuit's Mandate does not bar this Court from reconsidering the issue of bad faith

A district court has one task when enforcing the Mandate of the appellate court – it must "distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not." *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000). Although the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, the district court may still decide any issue "not expressly or impliedly disposed of on appeal." *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th

Cir. 1986). Northern acknowledges that footnote 21 is non-binding dicta. *See* Reply at 3:17-18 ("Northern does not contend that the conclusions [in footnote 21] are 'binding as legal precedent.'").

Ittella cites *Service Employees International Union Local 250 v. National Labor Relations Board*, 640 F.2d 1042 (9th Cir. 1981) for the proposition that the Ninth Circuit's Mandate precludes this Court from reconsidering the issue of bad faith. (Opposition at 3:14-19.) Ittella argues that when the Ninth Circuit failed to rule on bad faith, this Court's Judgment regarding bad faith became final. *Id.*

Service Employees involved a labor union's claim that an employer had committed unfair labor practices in violation of sections 8(a) (1), (3), (4) and (5) of the National Labor Relations Act. 640 F.2d at 1043. The National Labor Relations Board ruled that the employer violated section 8 (a) (1), (4) and (5), but it expressly declined to rule on the alleged 8 (a) (3) violation. *Id.* Both parties appealed the Board's decision – the employer challenged the rulings on sections 8 (a) (1), (4) and (5), and the union challenged the ruling on section 8 (a) (3). *Id.* at 1044. The Court of Appeals for the District of Columbia Circuit reversed the board's ruling on 8 (a) (1), (4) and (5). *Id.* The court declined to address the union's 8 (a) (3) appeal, however, stating it was "unnecessary to give further consideration" to the claim because the court's decision on the employer's petition rendered the union's petition moot. *Id.* The appeals court declined to remand any portion of the case to the Board. *Id.*

The union petitioned the appellate court for rehearing on the 8 (a) (3) issue, stating that its petition was "directed to the elements of the case totally ignored by the panel." *Id.* The appellate court denied the petition, and the union never filed

a petition for certiorari to the Supreme Court. *Id.* After the appellate court denied its petition, the union returned to the Board and asked it to reconsider its original ruling on the 8 (a) (3) issue. *Id.* the Board declined the motion, finding that the Court of Appeals, by not remanding the matter, had concluded the case and therefore stripped the Board of jurisdiction. *Id.* the union then appealed the issue to the Ninth Circuit.

The Ninth Circuit held that the D.C. Circuit's opinion was res judicata with respect to the 8 (a) (3) issue. *Id.* at 1045. The court reasoned that "[i]t was open to the Court of Appeals to remand the case to the Board for further proceedings on the section 8 (a) (3) claim if the court saw any merit to that contention. The failure to remand implies a determination that the stipulated facts presented no violation of section 8 (a) (3) and the court's written disposition supports this conclusion." *Id.*

Ittella argues that *Service Employees* requires a holding that the Ninth Circuit, by refusing to address the issue of bad faith, necessarily deprived this court of jurisdiction to hear Northern's appeal. (Opposition at 3:14-19, 7:8-10.) The Court disagrees. *Service Employees's* holding is strictly limited to cases in which a party asks the National Labor Relations Board to reconsider a ruling despite the absence of a remand order from the court of appeals. See, e.g., *N.L.R.B. v. Lundy Packing Co.*, 81 F.3d 25, 26 (4th Cir. 1996) ("Absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court."); *George Banta Co., Inc., Banta Div. v. N.L.R.B.*, 686 F.2d 10, 16 (D.C. Cir. 1982) ("Absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court."); *W.L. Miller Co. v. N.L.R.B.*, 988 F.2d 834, 837 (8th Cir. 1993) ("None of the parties applied to this

court for remand. . ."). The instant case does not involve the National Labor Relations Board, and in this case the Ninth Circuit *did* remand to the district court to strike punitive damages. The Court therefore finds that *Service Employees* is inapplicable to the facts of this case.

Since *Service Employees* is not applicable here, the Court is left with the general rule regarding the enforcement of mandates – namely, that the district court may still decide any issue "not expressly or impliedly disposed of on appeal." *Nguyen*, 792 F.2d at 1502. This Court has reviewed the Mandate and the subsequent Order denying Northern's petition for rehearing. The Ninth Circuit gave clear instructions that it was *not* ruling on the issue of bad faith. *See* Mandate at 3 ("Bad Faith . . . need not be decided . . .").

Ittella nonetheless asserts that the Ninth Circuit impliedly supported a finding of bad faith when it refused to hear the issue. (Opposition at 4:25-27.) This assertion is unsupported by the language of the Mandate and the Order. The Court therefore finds that the Mandate does not preclude this Court from reconsidering its judgments regarding bad faith.

B. Under Rule 60(b) the Court has Discretion to Reconsider Final Judgments and Orders When the Movant Has Shown Both Injury and "Extraordinary Circumstances"

Neither party disputes that the Court has the power, under Federal Rule of Civil Procedure 60(b), to revisit final orders or judgments. Under the *Alpine Land* standard, Northern is entitled to relief if it can show: 1) injury, and 2) "extraordinary circumstances." 984 F.2d at 1049.

Northern alleges that it will be injured here if it is forced to pay Ittella's attorneys' fees despite the Ninth Circuit's suggestion that Northern did not act in bad faith. (Motion at 3:22-4:1.) However, this injury would only occur if Northern is forced to pay Ittella under the terms of the Settlement Agreement – an agreement that Northern entered into willingly. (Motion at 2:21-25.) No case authority suggests that a party can be relieved from a judgment or order under Rule 60(b) for the purpose of escaping an injury of its own making.

1. Northern Must Show "Extraordinary Circumstances"

Even if the Court were to find that Northern's "injury" is sufficient to satisfy *Alpine Land*, Northern is ineligible for Rule 60(b)(6) relief unless it can show "extraordinary circumstances."

Northern cites three circumstances that have changed since this Court's prior orders. First, the Ninth Circuit's Mandate suggested, in footnote 21, that there was no grounds for a finding of bad faith. (Motion at 5:20-6:2.) Second, the subsequent decision in *Morris v. Paul Revere Life Ins. Co.*, 109 Cal.App.4th 966 (2003). Third, the subsequent decision in *Buxbaum v. Aetna Life & Cas. Co.*, 103 Cal.App.4th 434 (2002).

a. The Ninth Circuit's dicta does not represent an "Extraordinary Circumstance"

Northern argues that footnote 21 is a "new fact that, particularly when coupled with new case authority, permits this Court to adjust its prior conclusions in the interest of

justice for the sake of consistency between the two tribunals." (Motion at 6:6-9.)[3]

Footnote 21 fails to qualify as an "extraordinary circumstance" for the purposes of Rule 60(b)(6) for three reasons. First, "extraordinary circumstances" are usually limited to those which explain and excuse a party's failure to file a timely appeal from an order or judgment. *Martella*, 448 F.2d at 730 ("In order to bring himself within the limited area of Rule 60(b)(6) a petitioner is required to establish the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal."),

Second, even if this Court were to extend the universe of "extraordinary circumstances" to include dicta in an appellate court's decision, footnote 21 would fall short. The footnote is not supported by a written analysis of the Ninth Circuit's reasoning for it. In the absence of at least some indication of the Ninth Circuit's rationale, including its discussion of how the facts of the case interact with California law, footnote 21 lacks persuasive force.

Third and finally, the Ninth Circuit itself recognized that bad faith requires only a "more probable than not" standard, while punitive damage awards require "clear and convincing evidence." (Mandate at 5.) The Ninth Circuit's reversal of

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[3] If Northern is attempting to argue that footnote 21 is a new "fact" that meets the requirements of "newly discovered evidence" under Rule 60(b)(2), the Court must reject that proposal out of hand. Northern cites no case authority to support this concept, probably because there is none. More importantly, if this Court were to adopt Northern's logic, every court decision could be considered "newly discovered evidence" for purposes of a Rule 60(b)(2) motion, something which would make nearly every case automatically eligible for Rule 60(b)(2).

punitive damages was directly traceable to this higher standard of proof. *Id.* at 6-7 ("We cannot say that the evidence was so one-sided as to meet the clear and convincing standard for the sort of conduct to which the California punitive damages standard is limited."). Since the Ninth Circuit's punitive damages analysis was both expressly and impliedly separate from any bad faith analysis, footnote 21 lacks persuasive force.

Because footnote 21 is dicta with no persuasive force, the Court finds that footnote 21 fails to support a Rule 60(b)(6) motion.

b. Supervening Cases Cited by Northern Do Not Rise to the Level of "Extraordinary Circumstances"

Northern also argues that two cases which were decided after this Court's bad faith orders – *Morris* and *Buxbaum* – provide the "catalyst" for this Court to revisit its prior rulings. Importantly, Northern never argues that either case overruled any of the case authority on which this Court relied in its earlier rulings. Northern says only that *Morris* "set[s] forth, with clarity never before articulated, a necessary component of the bad faith doctrine," (Motion at 6:10-17), and that *Buxbaum* is not "readily distinguishable" from this case, (Reply at 9:10-28).

Even if supervening cases could represent "extraordinary circumstances" – a proposition for which Northern cites no case authority – neither case addresses the reasons underlying this Court's original rulings. This Court's April 5 Order, which rejected Northern's summary judgment motion, relied heavily on *Shade Foods, Inc. v. Innovative Prods. Sales & Marketing, Inc.*, 78 Cal.App.4th 847, 879-80 (2000) (holding that one of the most critical factors to consider in analyzing a

bad faith claim is the adequacy of the insurer's investigation) and *Allstate Ins. Co. v. Madan*, 889 F.Supp. 374, 381 (C.D. Cal. 1995) (holding that an insurer is liable for bad faith if it disregards evidence supporting coverage). (April 5 Order at 27:16-28:23.) Neither *Morris* nor *Buxbaum* reversed *Shade Foods* or *Allstate*. The Court's May 22, 2002 denial of Northern's motion for judgment as a matter of law, which Northern also asks the Court to revisit, presumably relied on a similar rationale.[4]

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[4] The Court did not issue a written order when it denied Northern's oral Rule 50 motion on May 22, 2002, but the Court's rationale can be found in the Court's later rulings on the bad faith issue.

After the jury rendered its verdict on May 23, 2002, Northern moved for judgment as a matter of law on the issue of bad faith. In rejecting this motion, the Court noted that Northern's arguments on bad faith were identical to those that Northern presented with respect to punitive damages. (July 31, 2002 Order Denying Northern's Motion for Judgment After Trial Pursuant to Rule 50(b) at 8:1-3, 12-15.) The Court then noted that "those arguments were rejected by this Court for the reasons stated in the July 25, 2002 order and Northern does not provide anything here to sway this Court to change its mind." *Id.* at 8:15-21.

The Court's July 25, 2002 order arose out of Northern's motion for judgment as a matter of law on the issue of punitive damages liability. In that order the Court explained that there were ample facts to support the jury's verdict regarding punitive damages. This evidence is described in Section II(C)(1) of this Order. Based on these facts the Court held that there was a sufficient basis for the jury to find that Northern: 1) consciously avoided paying out under the Property Coverage despite knowing it was Ittella's primary claim, 2) delayed addressing Ittella's product losses, 3) applied coverage exclusions that it knew did not apply, and 4) engaged in such actions even though it knew Ittella's losses were significant. (Order re: Punitive Damages at 5.) The Court concluded that "clear and convincing evidence supports the jury's verdict that Northern is guilty of malice, oppression or fraud." *Id.* at 7. Accordingly, the Court denied Northern's motion.

At the hearing on this motion, Northern argues that dicta in the Ninth Circuit Memorandum opinion suggested that the Ninth Circuit believed that the genuine dispute doctrine applied to the facts in this case. Northern made a similar argument in its motion papers. (Motion at 9, fn. 4; Motion at 7, fn. 3.) According to Northern, if the Court were to find that Northern's actions were based on a "genuine dispute" about the applicability of certain policy terms, the Court would be required to find that Northern did not act in bad faith.

Northern's argument ignores substantial case law regarding an insurance company's duty to investigate claims in good faith. California courts have held that bad faith can be proven by the insurer's failure to adequately investigate the insured's claim. *See, e.g., Shade Foods, Inc. v. Innovative Prods., Sales & Marketing, Inc.*, 78 Cal.App.4th 847, 879-80 (2000) ("Among the most critical factors bearing on the insurer's good faith is the adequacy of its investigation of the claim."). In fact, the Ninth Circuit has held that the genuine dispute doctrine "does not eliminate bad faith claims based on an insurer's allegedly biased investigation." *Guebara v. Allstate Insurance Co.*, 237 F.3d 987, 996 (9th Cir. 2001). The Ninth Circuit has also held that a jury's finding that an insurer's investigation of a claim was biased may preclude a finding that the insurer was engaged in a genuine dispute. *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1010 (9th Cir. 2004); *see also Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 669 (9th Cir. 2003) ("Under *Guebara*, a genuine dispute does not exist where there is evidence that the insurer failed to conduct a thorough investigation.").

In short, California law's objective standard for determining the reasonableness of the insurer's conduct focuses on the entirety of the conduct itself, not just the presence or absence of legal support for an insurer's final

decision. *See Guebara*, 237 F.3d at 996 (citing five situations in which "biased investigation claims should go to a jury," including when "the insurer failed to conduct a thorough investigation"). When an insurer takes a series of actions that leads to the denial of coverage, some or all of those actions may be deemed unreasonable even though the denial of coverage has some justification under the law or under the terms of the policy. When this Court found that sufficient evidence existed to support the jury's finding of bad faith against Northern, the Court's analysis was based on the entirety of Northern's conduct, not just on its ultimate decision to deny payment.

Neither *Morris* nor *Buxbaum* overturns the significant case law which allows a finding of bad faith for an insurance company's failure to properly investigate a claim..[5] The Court

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[5] Northern also places significant reliance on *Chateau Chamberay Homeowners v. Associated International Insurance Co.*, 90 Cal.App.4th 335 (Cal.App.Ct. 2001) The Court finds that *Chateau Chamberay* is distinguishable.

In *Chateau Chamberay* the defendant insurance company conducted a thorough investigation into the insured's claims. *Id.* at 340-41. The appellate court upheld summary judgment in favor of the defendant, finding that "[t]here is no factually supported suggestion in this record that (1) [defendant] ever misrepresented the nature of its investigatory activity . . . (3) did not honestly select independent experts to make the appropriate loss evaluations . . . or, (5) failed to conclude a thorough investigation." *Id.* at 349.

In contrast, Ittella had significant factual support for its claim of inadequate investigation. As the Court pointed out in its April 5 Order denying summary judgment on the issue of bad faith, there was a genuine *factual* issue about whether Northern's changing coverage decisions were an arbitrary attempt to cut off Ittella's insurance benefits. (April 5 Order at 27:16-28:20.) The trial also produced evidence that Northern's

therefore finds that intervening case law, and the Court's prior application of existing law to the instant case, does not rise to the level of "extraordinary circumstances."

2. Conclusion: Northern has Provided No Reason for this Court to Reverse its Prior Rulings Regarding Bad Faith

Nothing cited by Northern supports a finding of "extraordinary circumstances" which would justify reversing this Court's previous rulings on the issue of bad faith. Footnote 21 of the Ninth Circuit's Mandate lacks persuasive force because it is devoid of factual analysis and relies on a different standard of proof than the Mandate's holding on punitive damages. Footnote 21 also does not constitute "new evidence" which would justify reconsideration of this Court's prior rulings. The *Morris* and *Buxbaum* cases, both cited by Northern here, do not overrule the cases on which this Court relied in denying Northern 's previous motions with regards to the issue of bad faith. As such, they are insufficient to support a Rule 60(b) motion.

This Court accordingly **DENIES** Northern's Rule 690(b) motion.

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investigation was biased and incomplete. The Court noted in its July 25 Order that Northern's coverage decisions were at odds with the opinions of both independent and company-employed adjusters, and that no evidence supported Northern's claims that it sought coverage opinions or continued to investigate Ittella's claims after January 4, 2002. (July 25 Order at 4:3-6:23.)

C. The Court Lacks Jurisdiction to Hear Northern's Contract Claims

In the alternative, Northern asks this Court to: 1) Find that an award of attorneys' fees would violate the Settlement Agreement, and/or 2) Reform the Settlement Agreement. (Motion at 9-11.)

In order for this Court to consider these requests, it must have jurisdiction over the Settlement Agreement. Although this Court ruled on the attorneys' fees issue originally, enforcement of a settlement agreement "is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 378 (1994); *see also Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995) ("a proceeding to enforce a settlement requires its own basis for jurisdiction, i.e., a district court does not retain 'inherent' or 'ancillary' subject matter jurisdiction to enforce a settlement simply because the dismissal of a federal action served as part of the consideration for the settlement agreement.").

This Court issued an Order Setting the Amount of Attorney's Fees on December 12, 2002. Northern immediately appealed the order to the Ninth Circuit.

On May 7, 2003, the parties signed the Settlement Agreement. The Settlement Agreement provided that Northern would dismiss its appeal to the Ninth Circuit. (Agreement ¶ 4.) The agreement also stated that Ittella would not seek to enforce this Court's December 2002 award of attorneys' fees. *Id.* ¶ 3. The terms of the Settlement Agreement were never incorporated into a court order.

The Court has reviewed the record of this case and has found no order, by either this Court or the Ninth Circuit, which grants this Court jurisdiction to enforce the parties' obligations to comply with the terms of the agreement. On these facts, the Court lacks jurisdiction to hear Northern's claims relating to the enforcement or terms of the Settlement Agreement. The Court therefore **DENIES** Northern's request for this Court to interpret or reform portions of the Settlement Agreement.

V. CONCLUSION

For the reasons stated above, the Court hereby:

- **DENIES** Defendant Northern Insurance Company's Rule 60(b) Motion Re: Breach of the Covenant of Good Faith and Fair Dealing.

- **DENIES** Defendant Northern Insurance Company's motion for this Court to interpret or reform portions of the May 2003 Settlement Agreement between Defendant Northern and Plaintiff Ittella Foods.

IT IS SO ORDERED.

DATE: October 26, 2004

LOURDES G. BAIRD
LOURDES G. BAIRD
United States District Judge